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APR 28 1995

April 28, 1995

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William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Market Entry and Regulation of Foreign-affiliated Entities
IB Docket No. 95-22, RM-8355, RM-8392

Dear Mr. Caton:

On behalf of Heftel Broadcasting Corporation, proponent in the above-referenced proceedings, please find enclosed an original and nine copies of its Reply Comments in the above-referenced proceeding. The additional copies are provided for the Commissioners.

Should you have any questions concerning this matter please contact this office directly.

Yours very truly,

Richard M. Riehl

Enclosures

RMR/das
cc: Ms. Susan Sorrenson (FCC)

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Before The

Federal Communications Commission

Washington, D.C. 20554

APR 28 1995

In The Matter Of	)	
	)	
Market Entry and Regulation of Foreign-affiliated Entities	)	IB Docket No. 95-22
	)	RM-8355
	)	RM-8392
	)	

TO: The Commission

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REPLY COMMENTS OF HEFTEL BROADCASTING CORPORATION

HALEY BADER & POTTS P.L.C.
4350 North Fairfax Drive, Suite 900
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April 28, 1995

SUMMARY

In response to that portion of the NPRM seeking comment on whether "effective market access" should be included as a factor in Section 310(b)(4) determinations with respect to broadcast licensees. MMTC submitted comments that urge the Commission to restrict any liberalization of the indirect foreign ownership constraints solely to minority owned enterprises.

Heftel Broadcasting Corporation's ("Heftel") Comments in Reply urge the Commission, for a number of fundamental reasons, to permit indirect foreign investment in broadcast enterprises on essentially the same basis as that now permitted with respect to common carrier licensees.

MMTC, supports its arguments that any relaxation of the Commission's determination under Section 310(b)(4) should be tied directly to investments in minority owned enterprises, principally because the limited size of most minority enterprises has resulted in foreign investor disinterest. MMTC's solution is to continue to severely restrict foreign investments in non-minority owned broadcast enterprises in the hope that some additional foreign investment capital might trickle down to them.

Heftel, in contrast, encourages the Commission: 1) to reject MMTC's proposal to confine additional foreign investment to minority enterprises; 2) to liberalize its current treatment of Section 310(b)(4) to permit increased foreign investment in broadcasting under conditions where "control" and "leverage" are minimized; and 3) to reject "effective

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market access" as a factor for increased indirect foreign broadcast ownership under Section 310(b)(4) of the Act in the absence of a direct congressional mandate.

Permitting greater alien investment in broadcasting is necessitated by the evolving global market for telecommunications services and the growing need for more non-traditional sources of investment in broadcast entities. Furthermore, the concerns which led to the alien ownership restrictions of 47 U.S.C. § 310(b)(4), while still carrying some validity in the broadcast area, are badly in need of revision. The facts of international commercial activity, as reflected in the statement of the U.S. Trade Representative and the Department of Transportation's consideration of foreign investment in U.S. Air Carriers, no longer support the strict prohibitions that exist in the Commission's present criteria for implementing the discretionary provisions of 47 U.S.C. § 310(b)(4) where broadcast enterprises are concerned.

Thus, while Heftel believes 47 U.S.C. § 310(b)(4) mandates that effective U.S. citizen control remain over all broadcast licensees, nevertheless, relaxation of the 25% indirect ownership benchmark can be achieved without doing mischief to these congressional mandates. Heftel also urges the Commission to adopt specific guidelines, such as those submitted as part of these comments, for analyzing requests to exceed the benchmarks set forth in section 310(b)(4).

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TO: The Commission

REPLY COMMENTS OF HEFTEL BROADCASTING CORPORATION

Heftel Broadcasting Corporation ("Heftel"),[1] by its attorneys, submits these Reply Comments in response to the comments filed on behalf of the Minority Media and Telecommunications Council ("MMTC") in the above-referenced rulemaking proceeding.

MMTC's Comments would have the Commission restrict any liberalization of indirect foreign ownership constraints solely to investment in minority owned enterprises. Heftel, on the other hand, believes the Commission, under clear guidelines, can and should relax its strict adherence to the benchmarks contained in Section 310(b)(4) of the Communications Act (the "Act"). In support of this position, the following is submitted.

[1] Heftel is a publicly traded company whose primary business is the operation of Spanish language radio stations in the principal Hispanic markets in the United States, presently Los Angeles, Dallas-Ft. Worth, Miami and New York.

INTRODUCTION

In the *Notice of Proposed Rulemaking*, released February 17, 1995 ("*NPRM*"), the Commission sought, among other matters,[2] comment as to whether market access should be considered a factor in evaluating broadcast applications that propose indirect alien ownership in excess of the 25 percent statutory benchmark found in Section 310(b)(4) of the Communications Act.[3]

In addition to seeking comment on whether "effective market access" should be included as a factor in Section 310(b)(4) determinations with respect to broadcast licensees, the FCC invited commenters:

> "to submit any other proposals they believe would be appropriate in defining our Section 310(b)(4) analysis for broadcast licensees, including those which might permit alien control of a licensee's parent company."

NPRM ¶ 103.

Heftel takes this opportunity to provide the FCC with an analysis of the legislative history of Section 310(b)(4) which demonstrates that Congress intended a more relaxed interpretation of this statutory provision than has been traditionally applied. On this basis, Heftel must respectfully oppose MMTC's position which, in effect, would restrict the benefits of Section 310(b)(4) by limiting alien investment to minority enterprises. Heftel also provides the Commission with public interest reasons and precedential support for applying an actual control test under the Act and suggests guidelines

[2] The Commission's major focus in the NPRM is the policy governing the participation of foreign carriers in the U.S. international telecommunications market.

[3] In the *NPRM* the Commission noted that it has traditionally had heightened concern for foreign influence over or control of broadcast licensees which exercise editorial discretion over the content of their transmissions. *See NPRM* at ¶ 99.

for the FCC to use in reviewing requests that exceed the statutory benchmarks. Finally, Heftel agrees with MMTC, although for different reasons, insofar as it believes the Commission should forego "Effective Market Access" as a factor in Section 310(b)(4) considerations until Congress has first spoken on the matter.

CONTROL, NOT OWNERSHIP, SHOULD BE THE FOCUS OF SECTION 310(b)(4) ANALYSIS

Any conclusions the Commission may reach with respect to either "Effective Market Access" or relaxation of the criteria for indirect alien investment in broadcasting under Section 310(b)(4) must be consistent with the discretion permitted the Commission under this provision. An essential first step, therefore, is to establish as precisely as possible, the parameters of the Commission's discretion under Section 310(b)(4) of the Act. The legislative history of this provision provides significant insight into the thinking and concerns of Congress with respect to the indirect alien ownership provisions of Section 310(b)(4).

Section 310(b)(4) (originally Section 310(a)(5) is the result of modifications to Section 12 of the 1927 Radio Act. *Senate Report No. 1045 of the 72nd Congress* (S.Rep. No. 1045, 72nd Cong., 2d Sess. (1933)) pertinent portions included hereto as Exhibit 1] reflects that in HR 7716 (passed by the 72nd Cong., but pocket vetoed by the President) the strict constraints on foreign ownership contained in Section 12 of the Radio Act were being relaxed and that up to 20% of a licensee corporation's capital stock could be alien owned and 20% alien officers and directors would be permitted. In making these changes, the Senate Report emphasized "... that radio communications should be kept strictly under the control of American citizens and American corporations, it is believed no serious injury or handicap will result from permitting ..." such alien ownership and participation. See Exhibit 1, p. 10:203 emphasis added. This comment, it must be emphasized, related to the direct ownership provisions of what are now 310(b)(1)-(3) and not the indirect ownership provisions subsequently included in what is now Section 310(b)(4).

Senate Report No. 781 of the 73rd Congress, (S.Rep. No. 781, 73rd Cong., 2d Sess. (1934)), pertinent portions attached hereto as Exhibit 2) reflects the addition of an entirely new indirect ownership provision, currently Section 310(b)(4), permitting even greater indirect alien ownership and representation.[4] In supporting this more lenient provision, the Report emphasizes that this provision:

> "seeks to insure the American character of holding companies whose subsidiaries operate under radio licenses granted by the Commission."

S.Rep. No. 781, 73rd Cong., 2d Sess. 7 (1934) (Exhibit 2).

The *Senate Report* also stated:

> "To prohibit a holding company from having any alien representation or ownership whatsoever would probably seriously handicap the operation of those organizations that carry on international communications and have large interests in foreign countries in connection with

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[4] Perhaps anticipating earlier objections on national security grounds, the report also notes that the President, under his war powers, has the authority to seize all radio stations in time of war. S.Rep. No. 781, 73rd Cong., 2d Sess. 7 (1934).

their international communications. Such a rigid restriction seems unnecessary."

Id. Exhibit 2 at p. 7.[5]

In the *Conference Report* on the Communications Act, H.Rep. No. 1918, 73rd Congress (1934) (pertinent portions of the *Conference Report* included as Exhibit 3 hereto), the constraints on indirect alien ownership and participation were further modified to make clear that the statutory provisions were benchmarks only and, in addition, placed the burden on the Commission to disallow foreign ownership in excess of the statutory benchmark only upon a finding that the public interest would not be served by ownership or control elements that exceed the statutory benchmark.

In summary, the foregoing brief analysis of the Section 310(b)(4) legislative history makes clear that alien control and not alien ownership *per se* was the concern of Congress when the final version of Section 310(a)(5), now codified as Section 310(b)(4), was enacted. Viewed in this light, it is submitted, Congress' intent when it inserted the disjunctive language: "of which one-fourth of the capital stock is owned of record <u>or</u> voted by aliens..." (emphasis added) in the current Section 310(b)(4) was to focus on voting (control) and not ownership (equity) alone. Review of the legislative history strongly suggests that use of the phrase "capital stock is owned of record" means little more than stock ownership with votes attached. In context, the term "or votes" was clearly inserted to cover situations where, for example,

[5] Section 310(a)(5), now codified as Section 310(b)(4) was added to extend the alien ownership restrictions in Section 12 of the Radio Act of 1927 to holding or parent companies of radio licensees.

control could be accomplished through proxies with only a small amount of a corporation's stock actually owned by an alien.[6]

In short, viewed in their entirety, the constraints on the Commission's discretion under Section 310(b)(4) are simply to insure that regardless of the actual equity or other indirect interest held, the Commission must be assured that control of parent companies, in all of its possible facets, remains in the hands of U.S. citizens.

ALLOWING ADDITIONAL FOREIGN INVESTMENT IN BROADCASTING SHOULD NOT BE CONTINGENT UPON ALIENS INVESTING IN MINORITY OWNED COMPANIES

Heftel believes the Commission should reject MMTC's proposal to confine additional foreign investment to minority enterprises. Heftel's objections are three-fold in nature. First, as reflected in the foregoing analysis, Congress gave the Commission wide discretion in the area of indirect foreign investment in radio facilities to insure that effective control remains in the hands of U.S. citizens. It follows, therefore, that the only public interest factors the Commission may properly consider under the Section 310(b)(4) mandate are those factors which assure that control of a broadcast enterprise remains in the hands of U.S. citizens. Viewed from this perspective, it is submitted, requiring alien investment in minority domestic enterprises does not meet this test since it has nothing to do with control.

Second, given the current opposition of the majority of Congress to providing special treatment to minorities through the recently

6 For example, John Kluge, former head of Metromedia, Inc., maintained de facto control over that company although his equity interest did not exceed 15%.

repealed tax certificate policy, any effort by the FCC to make investment in minority broadcasters a *quid pro quo* for permitting additional foreign investment in broadcasting is not only inconsistent with present Congressional policy, but could be construed as exceeding the Commission's discretion under Section 310(b)(4) which is limited to assuring U.S. citizen control of radio facilities whenever the statutory benchmark is exceeded.

Third, MMTC argues that "[t]he primary obstacle facing minorities seeking to break into media ownership is access to capital."[7] In support of this thesis MMTC contends, principally because of the size of most minority enterprises, foreign investors are disinterested. MMTC's solution is to continue to severely restrict foreign investments in non-minority owned broadcast enterprises in the hope that some additional foreign investment capital might trickle down to them. MMTC has, however, provided no tangible evidence that minority broadcasters, due to their size, face a harder task of obtaining willing investors or needed financing than does any other smaller business entity seeking to become or remain a broadcaster. In any event, the recent repeal of the Small Business Administration's Opinion Molder rule[8] has opened an entirely new source of capital where minority enterprises have always been given preferred access.[9]

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[7] MMTC notes that "alien media capital arrives in this country only in units too large for most minority deals." MMTC Comments at 6.

[8] See 59 Fed. Reg. 36042 (July 15, 1994) in which 13 C.F.R. 108, 120 and 123 were repealed. The repeal of the media policy or opinion molder rule was effective July 15, 1994.

[9] MMTC also proposes an American Communications Investment Bank to be used as a vehicle to increase foreign investment in minority media holdings. Such a proposal is clearly beyond the scope of this proceeding, so will not be addressed.

For the above-stated reasons, Heftel urges the Commission to reject any requirement that an allowed increase in alien investment in broadcasting be only for the benefit of minority broadcasters.

EXPANDED ALIEN OWNERSHIP UNDER THE EXISTING SECTION 310(b)(4) NON BROADCAST CONTROL PRECEDENT SHOULD BE ENCOURAGED

There is no reason to continue to restrict indirect foreign investment in broadcast enterprises. As will be demonstrated below, the constraints imposed in existing common carrier precedent are sufficient to assure control of the program content of broadcast stations.

A. Permitting Foreign Investment in Broadcast Enterprises Will Not Result in Loss of Control Over Programming

In its comments, MMTC argues that "alien ownership in American media would make broadcast owners even more distant from viewers and listeners than many of them are now." MMTC Comments at 2. MMTC's complaint reads like the radio ad that chastises an American convenience store chain for having its headquarters in Japan. The person in the advertisement complains they must call Japan if they want to voice their complaint. That view fails to take into account the powerful role the market place and consumer activism play in any industry, including broadcasting. Not only would a broadcaster who is unresponsive to its community of license be in trouble with the FCC, but the broadcaster would also lose listeners and with the listeners would go the advertising dollars that keep a broadcaster alive. This is the check on a broadcaster who does not program in the public interest -- loss of audience. Nonresponsive programming is not the exclusive province of aliens. American citizens are just as capable of failing to respond to their audiences as are foreigners. Moreover, such a consideration would appear to be clearly beyond the scope of this proceeding and the Commission's Section 310(b)(4) discretion.

MMTC's claim that by allowing aliens to indirectly hold more equity in a licensee, listeners will not know who is providing programming, is a "red herring." First of all, the issue is not the source of programming, but who decides what programming will be placed on a broadcast station. British programming is a mainstay on public broadcasting, for example, but it is U.S. citizen-controlled licensees who decide whether such programming should be broadcast at all.

Further, the legislative history of Section 310(b)(4) with respect to radio reflects that Congress fully expected the Commission to permit foreign investment in such enterprises in excess of the 25% benchmark so long as effective control over the programming selection and editorial policies remained firmly in the hands of U.S. citizens.

In this regard, it is important to emphasize that from the regulatory perspective, with the element of control removed from the equation, there is little to distinguish debt and equity capital.[10]

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[10] In its Comments, MMTC acknowledges the role that debt plays in terms of alien involvement in broadcasting. "Debt poses no regulatory problem for the Commission. Loans are freely sold worldwide without the knowledge of the Commission. The Commission tracks equity; it does not track debt. But, equity, not debt, is where influence lies. Even noncontrolling equity holders always have greater exposure and decision making rights than creditors." MMTC Comments at n.5. If the Commission were to permit more investment in U.S. media by foreign entities, undisclosed debt held by aliens would not be so much of a concern, because presumably there would be less of it -- aliens would be investors, not creditors. Contrary to MMTC's statement that influence does not lie with debt, Heftel reminds the Commission that with debt comes leverage -- which can be just as influential as equity.

However, from an operational perspective, the difference can be monumental. Debt capital generally imposes heavy burdens of interest and principal repayment and encumbers the borrower's assets. Equity capital on the other hand carries none of these burdens and looks to the broadcaster's success and growth as the basis for return on this type of investment. So long as sufficient constraints are in place to ensure effective control by U.S. citizens, the Commission, to the greatest extent possible, should adopt guidelines to maximize indirect foreign investment in broadcast licensees consistent with the constraints imposed by Section 310(b)(4).

B. The Commission Must Recognize The Global Economy In Its Section 310(b)(4) Decisions

The strongest argument for liberalizing the way the FCC reviews requests to exceed the benchmarks in Section 310(b)(4) is the recognition that America no longer lives in a sheltered, dominating economy, untouched by economic factors beyond her borders.

As recently as July 20, 1989, U.S. Trade Representative Carla A. Hills, in opposition to proposed California legislation to impose reporting requirements on foreign investors in California businesses and property, advised the California Legislature that a policy of "[s]ingling out foreign direct investors for annual filing of disclosure statements," when the same is not required of domestic entities, "could discourage foreign direct investment in California, resulting in slower economic growth, productivity and job creation...." The Trade Representative said the requirement "not only imposes a potentially burdensome and discriminatory reporting requirement on foreign companies and individuals, but also signals that foreign investors may be unwelcome in California."[11]

It is thus clear that adhering to the Section 310(b)(4) benchmark as the limit on the indirect equitable interest aliens may have in a company that controls a licensee does more to hurt the broadcast industry than it does help without any countervailing public interest benefit.

C. The Department of Transportation Has Recognized This Expanded View in Certifying U.S. Air Carriers

Unlike the FCC's conservative exercise of its discretion under Section 310(b)(4), the Department of Transportation ("DOT"), in certifying U.S. Air Carriers, goes beyond the comparable statutory language of 49 U.S.C. 40102(15),[12] and includes an actual control test in its review of requests for air carrier certification.[13]

In a decision involving Northwest Airlines in 1991, DOT reexamined its application of the control test in order to reflect more accurately today's complex, global corporate and financial environment. It reviewed the relationship between voting equity, on

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[11] Letter opposing SB 1303, introduced by Senator Montoya on March 9, 1989, to require foreign investors in California real or commercial property to file annual disclosure statements with the California Secretary of State. Bill passed the state senate June 27, 1989; was withdrawn, without action, from General Assembly in November 1990. Included as Exhibit 4 hereto.

[12] The Federal Aviation Act of 1958, as amended in 1994, requires that a U.S. air carrier be a U.S. citizen, 49 U.S.C. 41102. Citizen is defined as:

> "... or (c) a corporation or association created or organized under the laws of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or one of its possessions."

49 U.S.C. 40102(15)(1994).

[13] The DOT has "consistently interpreted section 101(16) [the predecessor to 49 U.S.C. 40102(15)] to mean that (1) at least 75 percent of the outstanding voting stock must be owned by U.S. citizens; and (2) as a factual matter, the carrier must actually be controlled by U.S. citizens." *In re Page Avjet*, 102 C.A.B. 488 (July 1, 1983)(The decision is included as Exhibit 5-A hereto); *See also Premier Airlines*, 95 C.A.B. 101 (May 5, 1982). The decision is included as Exhibit 5-B hereto.

the one hand, and nonvoting equity and debt, on the other, and concluded that a foreign equity investment of up to 49%, of which no more than 25% was voting, taken alone, was not indicative of foreign control. *In the Matter of the Acquisition of Northwest Airlines, Inc. by Wings Holdings, Inc.*, DOT Order Modifying Conditions, Docket 46371, Order 91-1-41 (January 23, 1991) ("*Northwest II*). (Decision is at Exhibit 5-C hereto).

Lastly, similar to the implication of Section 310(b)(4), DOT imposed a reporting condition on Northwest, requiring the airline to disclose the identity of any KLM directors and any positions they hold on the Board. DOT also imposed a requirement that Northwest provide DOT with an annual report as to board or committee membership, including the citizenship of the members. *Id.*

The leniency with which DOT approached the Northwest/KLM merger represented a liberalization of DOT's analysis in this area, but reflects an approach more in tune with the changing dynamics of international investment, and should be viewed as a model for FCC review of requests to exceed the benchmarks in Section 310(b)(4).

D. FCC Interpretation Of The Communications Act's Foreign Ownership Limits In Non-Broadcast Cases

In the NPRM, the Commission reiterated its often recited distinction that the "concern about the effect of foreign ownership on national security is lessened when common carrier radio licenses are involved because they are 'passive' in nature and the licenses confer no control over the content of transmissions." *NPRM* at ¶18 citing *In re Request of MCI Communications Corporation British*

Telecommunications PLC, 9 FCC Rcd. 3960, 3964, ¶ 23 (1994). Heftel urges the Commission to reassess this position and adopt the view that being a content provider makes a communications entity no more susceptible to foreign influence than being a conduit. The need to be assured that U.S. citizens control and operate the common carrier conduit nondiscriminately is no less important and requires no less control than the choice of programming on broadcast stations. Indirect foreign investment in broadcast licensees does not alter this. Moreover, examination of Commission rulings in nonbroadcast situations reveals such a rationale is a distinction without a difference.

For example, in *Teleport Transmission Holdings, Inc.*, 8 FCC Rcd. 3063 (CCB 1993), the Commission found that an indirect alien ownership (voting) interest of 60% would not result in a loss of control where 75% of the officers and directors of the parent would be U.S. citizens. Similarly, in *GRC Cablevision, Inc.*, 47 FCC 2d 467 (1974), the Commission concluded that U.S. citizen control would be maintained where the parent of a Cable Television Relay Service ("CARS") licensee (a cable television operator) would be owned by aliens and only a majority of the directors of the parent would be U.S. citizens.

The *GRC Cablevision* case, it is submitted, is of critical significance in resolving whether to make Section 310(b)(4) determinations in broadcasting consistent with the FCC's ruling in these non-broadcast cases.[14] *GRC*, at the time of the above-ruling,

[14] In later amendments to Section 310(b), CARS stations, among others, were exempted from the alien ownership restrictions.

was a multi-system CATV operator. There are no statutory restrictions on foreign ownership of CATV systems. Further, the Commission in 1976[15] and again in 1980[16] declined to adopt rules restricting foreign ownership or control of CATV systems. This anomaly, it is submitted, cannot be ignored. CATV system operators, with some limits, have the absolute right to determine what programming is disseminated over their multi-channel (now 30 to 150 channels) systems, without any concern for possible foreign influence.[17] Furthermore, many CATV operators originate their own programming. On the other hand, a broadcaster, with but one of a number of voices in the same community, has been more severely restricted from foreign equity participation than has any other form of radio communications.

There is no longer any reason to treat broadcasters differently under Section 310(b)(4), and there is every reason to relax the present restrictions to make foreign investment in broadcasting attractive, while nevertheless adhering to the Congressional mandate in Section 310(b)(4).

SUGGESTED GUIDELINES FOR FCC REVIEW OF REQUESTS THAT EXCEED THE SECTION 310(b)(4) BENCHMARKS

The Commission has repeatedly stated that, in considering indirect foreign ownership in excess of the statutory benchmark, it "has balanced the U.S. presence in one or more of the remaining areas (alien ownership, alien officers, or alien directors)...." *Teleport*

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[15] *Cable Television Ownership Requirements*, 59 FCC 2d 723 (1976).
[16] *Foreign Ownership of CATV Systems*, 77 FCC 2d 73 (1980).
[17] *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Transmission Holdings, Inc., supra. 8 FCC Rcd. at 3064-65 and cases cited therein.

To guide the Commission's analysis within the foregoing framework, Heftel recommends the following guidelines be adopted where a proposed indirect foreign investment in broadcasting exceeds the statutory benchmark:

1) Require the Commission's prior consent for any foreign ownership proposal that exceeds the statutory benchmark;

2) Permit foreign equity investment in a parent corporation of up to 49% so long as:[18]

a) Alien positions on the parent's board of directors are limited to 25%;

b) No alien Director participates on any committees that effectively control significant aspects of the operation of the parent or its licensee subsidiaries, such as the executive committee, nominating committee, or finance committee;

c) No alien officers or directors of licensee subsidiaries; and

d) Station Ownership Reports, to include complete information regarding the participation of foreign directors and key alien employees in the operation of both the parent and licensee subsidiaries where appropriate.

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[18] In cases where control resides in a separate class of stock, limited to US. citizen ownership, the amount of equity ownership could safely be increased.

3) Review on a case-by-case basis situations where foreign debt investment is part of a total investment package and/or where foreign debt financing also contains constraints on operations or affords future equity participation.

Adoption of such "safe harbor" guidelines will permit the U.S. parent corporation and the potential foreign investor to be assured that if the guidelines are followed, Commission approval will be prompt.

THE COMMISSION SHOULD REJECT EFFECTIVE MARKET ACCESS AS A FACTOR IN SECTION 310(b)(4) EVALUATIONS

While Heftel strongly disagrees with MMTC that use of Effective Market Access as a factor in the public interest determination of section 310(b)(4) would result in the loss of broadcasting's American character, as portrayed by MMTC, to the extent that MMTC asks the FCC to be cautious with any Effective Market Access policy it may adopt, Heftel is in agreement.

As reflected in the foregoing analysis, Congress gave the Commission wide discretion in the area of indirect foreign investments in radio facilities to assure that effective control remains in the hands of U.S. citizens. It follows therefore, that the only public interest factors which the Commission may properly consider under its Section 310(b)(4) mandate are those factors which assure that control of the broadcast enterprise remains firmly in the hands of US citizens.

Viewed from this perspective, it is submitted, Effective Market Access fails to meet this test. Moreover, as the foregoing discussion establishes, the Commission presently has the discretion to permit expanded foreign investment in broadcasting. Since Effective Market

Access, as a factor to be considered in the Commission's Section 310(b)(4) analysis, could only serve to artificially restrict indirect foreign investment in radio facilities, Heftel questions whether the Commission's Section 310(b)(4) discretion is sufficient to encompass such a consideration. Moreover, it is submitted, such a restriction on foreign ownership, which is outside the question of control, is better left to Congress in the first instance.[19]

CONCLUSION

For all of the reasons stated above, Heftel respectfully requests the Commission to reject the restrictive approach favored by MMTC and to liberalize its Section 310(b)(4) discretionary review criteria to acknowledge and allow for the growing role of foreign investment in U.S. enterprises, while continuing to be vigilant of foreign control in broadcasting. Heftel also requests the Commission to adopt specific guidelines to follow in determining whether the

[19] There is presently a bill pending in the Senate sponsored by Senator Pressler that addresses this question.

public interest is not served in a case where the benchmarks are exceeded.

Respectfully submitted,

HEFTEL BROADCASTING CORPORATION

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April 28, 1995

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EXHIBIT 1

Senate Report on HR 7716
72nd Congress